

Dear Mr. Silver:

As we discussed Tuesday, November 13, I am writing this letter on behalf of U.S. EPA Region 5 and the Enforcement Team working on the removal action necessary to protect the public health, welfare, or the environment at the South Dayton Dump & Landfill Site in Moraine County, Ohio. This letter is intended to outline EPA's response to the suggested changes you and your clients proposed in the markup of the draft Administrative Order on Consent (AOC) which you sent to our team members on November 2, 2012. As I suggested to you on Tuesday, this letter is intended to provide a basis for further discussions of the AOC in a conference call we have tentatively scheduled for Tuesday November 20, at 1:00 p.m. CST/2:00 p.m. EST.

1. The first change you have proposed concerns the Agency's costs (page 2). The Agency rejects this proposed deletion. If EPA signs a Consent Order with a Potentially Responsible Party (PRP), the Agency expects to be reimbursed for all costs spent on the removal action, past, "interim" and future costs, including but not limited to future oversight costs.
2. The proposed change on page 3 (interpolation of "by them") appears to be unacceptable. In addition to seeming vague, it actually would create an appearance of absolving the Respondents themselves from any noncompliance. EPA could not agree to that.
3. The Agency rejects the proposed changes regarding costs (proposed deletion of paragraphs defining future, interim, and past costs) on pages 3 and 4.
4. You proposed "and EPA" as an addition to the definition of "U.S. EPA."

EPA could agree to that.

5. In re the proposed change on page 5, ("U.S. EPA's FINDINGS OF FACT"), EPA will not accept this change, but I believe I can provide alternative language that will limit the extent to which the Respondents agree not to contest the FINDINGS. Similar language might address the corresponding proposed change on page 8 in the heading for Section V.
6. Page 5, paragraph 9.b. "significant portions of which." I believe this change could be accepted by the Agency.
7. Page 5, 9.d. "Most of" is an acceptable change.
8. Page 5, 9.e. "includes.....partially" The Agency will consider this proposed change.
9. Page 6, 9.f., the proposed change makes an explicit reference to Dayton Power & Light, its proximity to, and use of, the South Dayton Dump. The Agency may consider this proposed illustrative example.
10. Page 6, 9.h., the proposed change is correct and accepted.
11. Page 6, 9.i., last sentence, EPA will consider making a change here.
12. Page 7, 9.m., the proposed change "5600" is approved.
13. Page 7, 9.p., the proposed change "chemicals" may be acceptable to EPA.
14. Page 7, 9.s., the proposed change "Four" is rejected. The correct number is Five.
15. Page 7, 9.s., the proposed change 1350 is rejected. 50 ppbv is the correct, validated result.
16. Page 8, 9.t., you proposed an additional sentence so the paragraph would conclude with the line: "The source of the methane levels in GP-2 has not been determined." The Agency approves this change.
17. Page 8, heading of Section 5. This proposed change is rejected, but see paragraph 5 of this letter, above.
18. Pages 8-9, 10.d.iii, the proposed change regarding Kelsey-Hayes TRW....is approved by EPA.
19. Page 9, 10.f.i, in the last bulleted paragraph on page 9, you propose further describing the location of the high benzene concentration found in "the sub-slab vapor sample collected from beneath 2031 Dryden Road-Building 1." The Agency agrees to accept this change.
20. Page 10, second bulleted paragraph on page 10, the proposed change "26005500-ppbv is rejected. 5500 is the correct number.

21. Page 10, the third bulleted paragraph, these proposed changes “Four~~Five~~” and the proposed new sentence beginning “This indoor air TCE result...” are not approved by the Agency. No.
22. Page 10, sixth bulleted paragraph, the proposed interpolation of “8 feet bgs, at” is not accepted. This probe, GP-2 has only two depths, not three.
23. Page 10, sixth bulleted paragraph, the second proposed interpolation regarding GP-2, “at depths of 12 and 16 feet bgs” appears accurate and is approved by U.S. EPA.
24. Page 11, proposed deletion of “groundwater” as modifier for sampling, accompanied by comment balloon explaining rationale for proposed change. EPA approves this change.
25. Page 11, 10.f.ii, proposed change “two~~three~~” regarding methane levels at nonresidential properties. EPA accepts this change.
26. Page 11, 10.f.ii, you commented that the range 14.7% to 24.1% was inconsistent with the previous paragraph and CRA results. EPA will correct the range to “2.5% to 24.1%.”
27. Page 13, paragraph 12. EPA will consider the proposed change and the associated comment.
28. Page 13, paragraph 13, “10 ~~4~~” business days.... EPA accepts this change.
29. Page 14, paragraph 16.b., you proposed adding another task to the work to be performed, “and complete an investigation to determine....etc. EPA approves this change.
30. Page 14, paragraph 16.e., you proposed two changes “based upon the methane extent....etc” and “and the methane is....etc” EPA approves both these changes.
31. Page 14, paragraph 16.e., andg., you proposed three deletions of the modifier “perimeter” for the terms “landfill gas extraction system” and landfill gas system.” EPA will consider these proposed changes, but is not approving them now.
32. Page 15, paragraph 17. The draft AOC provides 10 business days from the Effective Date to submit a Work Plan. You proposed 45 days. EPA rejects this change. We can discuss this during next week’s conference.
33. Page 15, 17.b. and 18: Similar requests for more time (30 instead of 7 days, 45 instead of 10) are proposed for plan submittals. These requests cannot be granted. We can discuss this in next week’s conference.
34. Page 16, paragraph 20. The requirement for post-removal site control has been stricken as a “proposed change” with no explanation. Not acceptable.
35. Page 17, paragraph 21.a. “on the tenth day of each month.” Acceptable.
36. Page 17, paragraph 21.b. “in electronic format....also....hard copy.” Acceptable.

37. Page 17, paragraph 21.c. “preceding” for ~~proceeding~~. Correct. Nice catch. Accepted.
38. Page 18, paragraph 25. Two proposed changes: “20” for ~~10~~. This can be discussed with the other demands for extra time to submit documents. The proposed addition of language “unless an access order has been issued....”
39. Page 19, paragraph 29. You proposed adding the phrase “or protection from disclosure” wherever the text of the draft AOC says “privilege” in this paragraph. EPA does not understand the reason for this request. Since this is model language, EPA is not inclined to change it here. You may have the opportunity to explain this request during our conference call.
40. Page 20, paragraph 32. Same proposal as in paragraph 29, above. You are welcome to explain (A) why you want this, and (B) why this will benefit the Agency.
41. Page 21, paragraph 35. Proposed deletion of reference to Section XV. No, the Agency will not delete payment of costs.
42. Pages 22-25: proposed deletion of Section XV Payment of Response Costs. Not acceptable.
43. Page 25 proposed addition of new language and new EPA obligations in Dispute Resolution Section. Unacceptable. No. Proposed deletion of reference to payment of costs. No. Proposed addition of “business” to modify (10) days. No. Proposed new language. No.
44. Page 26, paragraph 46 in Force Majeure Section. Proposed 48 hours to notify of Force Majeure event rather than 24 hours. EPA will afford you an opportunity to explain your rationale for this change.
45. Page 27 Stipulated Penalties. Paragraph 49.a. You proposed halving the amounts set forth in EPA’s draft AOC. No....but we can discuss what amounts would be appropriate.
46. Page 27, paragraph 49.b. You proposed setting compliance milestones in this section of the Order. We can discuss this suggestion.
47. Page 29, paragraph 50. Proposed to halve the amounts set forth in EPA’s draft AOC for late reports. No....but we can discuss what amounts would be appropriate.
48. Page 30, paragraph 57. Proposed deletion of language referring to payment of costs. No. Not acceptable.
49. Page 31, paragraph 59.b. Another proposed deletion of language referring to the payment of costs by Respondents. No.
50. Pages 31-32. You have entangled a couple separate proposals here. First, the deletion of references to payment of costs is unacceptable. Respondents to U.S. EPA issued Consent Orders pay costs. *Quid pro quo*. Your second proposal is more interesting. I understand why you want

to retain the right to bring claims under CERCLA against other agencies or departments of the United States in this matter, but you really must consider EPA's concerns as well. These Covenants not to Sue are always repositories of the most jealously guarded and difficult to change language in U.S. EPA Orders or Consent Decrees. The Agency will be most reluctant to set the kind of precedent your proposed language might create.

Page 33 paragraph 66.a. and b. Another proposed deletion of references to past costs. No. And no.

Page 33 paragraphs 67, 68, 69. You proposed deletion of these three paragraphs. Your terse explanation (comment L28-attached to paragraph 68 which you propose be deleted) was "same comment as above." Your previous comment, thirteen pages earlier (comment L27) was "not a fan of this section" referring to a different section of a different statute. EPA does not understand your comments, nor what your rationale is for the proposed deletion of these paragraphs. Your final, cryptic comment (L29—attached to paragraph 69 which you propose deleting) is "Same comment-EPA overreaching." EPA does not agree to delete these paragraphs.

Page 35. You put a comment here (L30 on page 35, paragraph 73), but it appears to be directed to your client. Tactfully, EPA will not intrude on this privileged, not to mention "protected from disclosure," exchange between attorney and client. You did not propose any change here. EPA agrees; no change is needed here.

Page 36. Page 35, paragraph 76, you propose deleting another reference to payment of costs. No.

Pages 35-37, Section XVII. Once again, you are requesting the deletion of an entire section and for the elimination of a substantial financial obligation. You are invited to make the most persuasive case you can when we talk next Tuesday, as to why EPA should reduce or eliminate from this Order the Financial Assurance provided for by Section XVII. Please be aware that overly radical surgery on the model Order may make it impossible to obtain Agency signatures on the resulting mutilated document.

That concludes this outline of the Agency's positions on your proposed changes. I feel confident that the Agency and the PRPs can agree fairly readily on a number of the points you raised. On certain other points (e.g., payment of costs) I am even more confident that we would be squandering precious opportunities if we waste too much time arguing over points that the Agency can not concede. While foreseeing difficulties arising out of some of the more daring changes you have ventured to propose, I am willing to listen, as you explain in regard to several of these changes you propose (A) why you want it; and (B) what benefit the agency will receive from agreeing to it.